No. 3943

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMERY VALENTINE,
Appellant,

vs.

JOSEPHINE G. COOK
(nee Valentine),
Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE.

Brief for Appellant

J. H. COBB,
Attorney for Appellant.

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STATEMENT OF THE CASE

Appellee was plaintiff in the Court below and Appellant was defendant. For convenience, we will hereinafter refer to them as plaintiff and defendant respectively.

Plaintiff sued defendant for divorce on the grounds of cruel and inhuman treatment, and for

alimony. In addition to the grounds replied upon for a divorce, plaintiff alleged:

That there was no issue of the marriage between plaintiff and defendant, and that the plaintiff is the mother of an eleven year old child from a previous marriage with Frank A. Cook, and is charged with the care and maintenance of said child and of the custody and control of her property, said child being the sole heir of the said Frank A. Cook.

Plaintiff further alleged that she was the owner of Lot 3 in Block 108 in the own of Juneau on which there is a mortgage of $1,400.00 or thereabouts, and in which the plaintiff and defendant and said Madeline have lived since the marriage of the plaintiff and defendant; which said lot is alleged to be of the aproximate value of $5,000.000, the plaintiff's equity therein to be of the value of $3,-500.00; and that such property was necessary for the use of plaintiff for a residence for herself and minor child; that the conduct of the defendant was such as to be a menace to the health and safety of the plaintiff and her child.

It was further alleged in substance that the defendant was worth about $85,000.00 and that he had an income of $12,000.00 per annum, and that plaintiff was without other means than as above alleged.

The relief prayed for, was,

First, an injunction during the pendency of the suit enjoining the defendant from visiting or entering upon the premises above mentioned, or in any way molesting or interfering with the plaintiff and her minor child, and further restraining the defendant from disposing of any of his property.

Second, the dissolution of the marriage.

Third, for alimony in the sum of $30,000.00 gross or $4,000.00 per annum.

Fourth, that plaintiff's name be changed to Josephine G. Cook.

Fifth, for costs and disbursements. (Rec. p. 1-7).

The defendant filed an answer admitting all the allegations of the complaint except those relied upon for divorce, which were denied, and he further denied the value of the property which he alleged was not more than $48,000.00, or that his income was greater than $4,000.00. He also filed a cross-complaint asking for adivorce from the plaintiff which is unnecessary to state as it is immaterial for the purpose of this appeal. (Rec. p. 8-19).

The plaintiff filed a reply putting in issue the allegations of the cross complaint. (Rec. p. 21-22).

The Court made findings of fact and conclusions of law and entered decree in favor of the plaintiff granting the divorce prayed for and alimony in the sum of $7,500.00, to be paid monthly at the rate of $125.00 per month. (Rec. p. 30-36).

It incidentally developed in the testimony that defendant was the owner of certain indebtedness against the estate of Frank A. Cook, the plaintiff's former husband, which indebtedness was secured by a mortgage upon Lot 3, Block 108, in the town of Juneau, and upon a certain store building in Douglas City, Alaska, belonging to said estate. It also incidentally developed that defendant had bought at judicial sale, two ctrtain mining claims formerly belonging to the Frank A. Cook estate, and made a declaration of trust in favor of the plaintiff for

said claims.

The Court thereupon further decreed that the defendant should deed and convey said mining claims, known as the Falls and Diana Lode Mining Claims, to the plaintiff, and to cancel and satisfy the mortgage held by him on Lot 1, Block 45, in Douglas City, and Lot 3, Block 108, in the town of Juneau. (Rec. p. 35-36).

Unfortunately the defendant has no appeal under the law from the decree granting the divorce of the plaintiff and the alimony as an incident thereto, (Leake vs. Leake, 156 Fed. 473) but he has an appeal from that portion of the decree commanding and directing him to deed to the plaintiff he mining property aforesaid and to cancel said mortgages, and the case is brought here for the purpose upon the following assignments of error.:

IV.

"The Court erred in that part of the decree directing and commanding the defendant to deed and convey to the plaintiff the mining claims known as the Falls and Diana Lode Mining Claims."

V.

"The Court erred in that portion of the decree directing and commanding the defendant to cancel and fully satisfy the mortgage held by him upon Lot 1 in Black 45 of the Down of Douglas, Alaska, and Lot 3 in Block 108 in the town of Juneau, Alaska." (Rec. pp. 36-37).

ARGUMENT.

A complete transcript of the evidence heard on the trial, duly certified to and made a part of the record, was sent up to this Court, but not printed.

as it was immaterial to the question involved. A short statement of the facts that are material was stipulated by counsel, (Rec. pp 45-47) and are as follows:

"1. That the facts regarding defendant's ownership of the Falls and Diana Lode Claims referred to in Assignment of Error IV., are as follows: Said claims were the property of Frank A. Cook, the former husband of plaintiff, at the time of his decease. Plaintiff was the administratrix of the estate of Frank A. Cook, deceased, and said claims were sold under an order of sale to pay certain debts of the estate and owned by the defendant. This sale occurred subsequent to the marriage of plaintiff and defendant. Subsequently defendant executed a declaration of trust, declaring he held and owned said claims and all proceeds therefrom for the use and benefit of his wife, the plaintiff herein."

"2. The facts regarding the mortgages referred to in Assignment No. V., are as follows: Said mortgages were executed by the plaintiff and her former husband, Frank A. Cook, upon the home in Juneau and a business house and lot in Douglas City. Subsequent to the death of Frank A. Cook, defendant purchased said mortgages, and has even since held the same and they are unpaid and have never been cancelled."

That a judgment must be supported by the pleadings; must embrace only the issues submitted to the Court, and cannot go beyond them, is fundamental. The law is ably and clearly stated by Mr. Black in his valuable work on Judgments, Vol. 1, Section 242, and we quote it in full:

"Besides jurisdiction of the person of the de-

fendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words a judgment which passes upon matter entirely outside the issue raised in the record is so far invalid. 'Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its actions are void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his

wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince anyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any merely arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard, or have had the opportunity of hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels.' (Munday v. Vail, 34 N. J. Law, 418. To the same effect see Reynolds vs. Stockton, 43 N. J. Eq. 211, 10 Atl. Rep. 385).

"On this principle, where a widow brought suit for the sole purpose of having dower assigned her in her deceased husband's lands, the heirs at law, who were infants, being made defendants, and the court not only directed an assignment of dower, but of its own accord decreed a sale of the residue of the land belonging to the heirs, it was held that, the court having exceeded its jurisdiction, the decree

of sale was void and might be collaterally attacked. (Seamster v. Blackstock, 83 Va. 232, 2 S. E. Rep. 36.) In these cases the court lacked jurisdiction of the subject or question which it assumed to pass upon because such matter was not submitted to it by the parties. But the same result would follow if, being invested with jurisdiction for a single purpose in a special statutory proceeding, it transcends the limit and attempts to exercise its powers for other purposes also. Thus where a statute provides for an action to foreclose a mortgage against a non-resident defendant, upon publication of summons, and authorizes a decree to be made for the sale of the mortgaged premises to satisfy the debt secured thereby, the court exhausts its jurisdiction in making the decree contemplated, and if, in addition thereto, it proceeds to award a personal judgment for a sum of money against the defendant. such judgment, being beyond its power, is void. (Wood v. Stanberry, 21 Ohio St. 149)."

If the court below had sustained the defendant's cross-complaint, he would, no doubt, upon the principles which governed in entering that part of the decree appealed from, have proceeded to foreclose the mortgage and cancel the declaration of trust!

The powers which the court has upon pronouncing a decree of divorce are prescribed by our statute. These are:

First, to provide for the care and custody of children.

Second, to provide for the payment for their nurture, support and education.

Third, for alimony, in gross or installments.

Fourth, for the delivery to the wife, when she is not in fault, of her personal property in possession or control of the husband at the time the judgment is given.

Fifth, for the appointment of trustees to collect, receive, expend, manage or invest any sum of money adjudged for the maintenance of the wife, or the support of the children committed to her care.

Sixth, to change the name of the wife, when she is not the party in fault. (Comp. Laws of Alaska, Sec. 1304.)

Manifestly there is nothing here giving the court power to cancel a mortgage held by the husband on property of the estate of the wife's former husband, for the benefit principally of a child of the wife and her former husband; nor to compel the deeding to the wife of real property held in trust for her by the husband. No power at all is given over real property in a divorce suit. Our statute differs in this respect from the former Oregon statute, under which the case of Wetmore vs. Wetmore, 67 Pac. Rep. 98, and the cases there cited, were decided. So that it is doubtful whether the court could have granted the relief it did, even had facts been plead and that relief prayed for.

We respectfully ask that that part of the decree cancelling the mortgages on Lot 1, Block 45, Douglas City, and Lot 3, Block 108, Juneau, and decreeing that defendant convey the Falls and Diana Lode Claims to plaintiff, be reversed, and said provisions stricken from the final decree of divorce, with costs to the Appellant.

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Attorney for Appellant.